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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re E.P., a Person Coming Under the  
Juvenile Court Law.

SONOMA COUNTY HUMAN  
SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

J.P. et al.,

Defendants and Appellants.

A123252

(Sonoma County  
Super. Ct. No. 2630-DEP)

Defendant M.M. is the father of E.P., a two-year-old dependent child of the juvenile court. Father appeals from the juvenile court's order terminating his parental rights. He contends the juvenile court erred by terminating his parental rights without finding that he is an unfit parent. We disagree. The juvenile court made such a finding at the dispositional stage, and Father has waived his right to appellate review by failing to prosecute an appeal from the prior dispositional findings and orders. Accordingly, we affirm.

## **I. FACTS**

On May 15, 2007, when E.P. was three months old, plaintiff Sonoma County Human Services Department (Department) filed a dependency petition alleging that E.P.'s mother, J.P., had failed to protect him (Welf. & Inst. Code, § 300, subd. (b)) due to her mental illness and substance abuse.<sup>1</sup> Specifically, the Department alleged that Mother was found wandering the streets at 1:00 a.m., holding E.P., while under the influence of methamphetamine. Mother had a fairly recent history of hospitalization for mental illness. The Department also alleged that Mother had abused or neglected E.P.'s older brother. (§ 300, subd. (j).)

In the jurisdiction/disposition report dated June 4, the Department recommended that Mother receive no reunification services with E.P., because of her failure to reunify with E.P.'s older brother and her failure to make a reasonable effort to treat the problems that led to the older brother's removal from her custody.

At the time of the writing of the report, Father was the alleged biological father of E.P. and did not have the legal status of presumed father. The Department recommended a paternity test for Father. On June 6, the court ordered Father to submit to a paternity test.

On June 13, the court ordered the issues of jurisdiction and disposition set for trial on July 20.

In an addendum report dated July 19, the Department stated that Father had established his paternity of E.P. The addendum report also included detailed information on Father's criminal history, particularly a two and one-half year prison sentence in Nevada for child sexual assault of 28-day-old infant twins. Father pleaded guilty to those offenses in Washoe County District Court. He signed a guilty plea memorandum in which he personally "admit[ted] the facts which support all the elements of the offenses

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<sup>1</sup> Subsequent statutory references are to the Welfare and Institutions Code. Subsequent dates are in 2007 unless and until otherwise indicated.

by pleading guilty.” The addendum report detailed additional criminal history of violent behavior and substance abuse. Because of this extensive criminal history, the Department recommended that E.P. not be placed with Father.

The Nevada guilty plea memorandum, and other documentation of Father’s criminal history, were attached to the addendum report and incorporated therein by reference. In his opening brief, Father claims the attachments were “unauthorized.” Nothing supports this claim. Indeed, the record shows no objection—by Father’s counsel or anyone else—that the addendum report would be part of the record before the juvenile court.

The Department’s proposed findings and orders, including a proposed finding that placement with Father would be detrimental to E.P., were also attached to the addendum report.

At the jurisdiction/disposition hearing on July 20, the court found Father to be the presumed father of E.P. All parties, including Father, essentially submitted the matter on the Department’s reports and proposed findings and orders. The court duly received into evidence the Department’s reports, including the addendum report, and adopted the Department’s proposed findings and orders.

The court found true the allegations of the dependency petition and declared E.P. a dependent child of the juvenile court. The court found there was clear and convincing evidence to remove E.P. from his parents’ custody, because there would be substantial danger to E.P.’s physical or emotional well-being if he was returned home and removal from parental custody was necessary for the protection of his physical health. Consistent with the Department’s recommendation, the court explicitly found, upon clear and convincing evidence, that placement with the noncustodial parent—i.e., Father—“would be detrimental to the safety, protection, or physical or emotional well-being” of E.P. The court ordered out-of-home placement for E.P. Despite the fact that Mother’s and Father’s progress toward alleviating the causes necessitating out-of-home placement of E.P. was

“minimal” and “nonexistent,” respectively, the juvenile court ordered reunification services for both parents and continued the matter for a six-month review hearing on January 10, 2008.<sup>2</sup>

Again, Father shades the facts in his opening brief. He observes that “nothing was said” at the July 20 hearing regarding the “determination under section 361.2 that placement of E.P. with [Father] would be detrimental or that [Father] was unfit.” This ignores Father’s counsel’s agreement at the hearing that the juvenile court need not read into the record the proposed orders and findings attached to the addendum report, but could simply incorporate them by reference.

On August 13, Father filed a notice of appeal from the July 20 jurisdictional and dispositional findings and orders of the juvenile court. He failed to file an appellant’s opening brief. Accordingly, we dismissed his appeal on November 30 pursuant to California Rules of Court, rule 8.360(c)(5)(A)(iii).

On September 6, the Department submitted a memorandum to the juvenile court reporting that Father had only visited E.P. once—on August 13—and refused to meet with his social worker to discuss his reunification plan unless his counsel was present. The Department recommended suspending visitation until Father complied with his court-ordered reunification plan.

On September 13, the court found that Father had been competently represented by counsel.<sup>3</sup>

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<sup>2</sup> Mother is not a party to this appeal. Her parental rights were terminated along with Father’s. She filed a notice of appeal from the order terminating parental rights. Her appellate counsel filed a Statement of No Issues. We dismissed Mother’s appeal on April 7, 2009.

<sup>3</sup> Apparently, this finding was the result of a *Marsden* motion by Father. The juvenile court found Father’s counsel to have been competent, but that there was a breakdown in attorney-client communication. Apparently, the court appointed new counsel.

On October 18, the court conducted a review hearing, referred to as a “Three-Month Oral Update of Family Reunification.” The Department reported to the court that E.P. was doing very well in his current placement. Mother had shown only minimal progress in alleviating the issues resulting in E.P.’s dependency. Father had shown “inadequate progress” toward alleviating those issues, had had limited contact with the social worker, had not complied with any elements of his reunification plan, and had not even met with the social worker to review the reunification plan. He had only visited with E.P. twice, and told the social worker he would cease visitation because “the office causes me mental health issues.”

In its report prepared for the January 10, 2008 six-month review hearing,<sup>4</sup> the Department recommended that reunification services be discontinued for both parents and that the court set a hearing pursuant to section 366.26 (.26 hearing). Mother was showing a willingness to comply with her reunification plan, but suffered from limitations impairing her ability to parent. Father continued to show minimal progress toward alleviating the issues that led to E.P.’s dependency. He was not in compliance with his reunification plan because he refused to sign a release of information form to allow verification of his participation in services. His contact with the social worker was infrequent, and he had not complied with the Department’s request that he participate in a sex offender assessment.

The six-month review hearing was held on May 13. Father did not testify or present witnesses on his behalf. The juvenile court terminated reunification services for both parents, finding both parents had made minimal progress in alleviating the issues that led to dependency. The court found there was no substantial probability that E.P. could be returned to parental custody. The court set a .26 hearing for September 4. Both parents were advised of their right to seek appellate review of the order setting the .26

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<sup>4</sup> Subsequent dates are in 2008 unless and until otherwise indicated.

hearing by filing a petition for extraordinary writ. (§ 366.26, subd. (1); Cal. Rules of Court, rule 8.452.)

Mother filed such a petition, which we denied July 28. (*J.P. v. Superior Court* (July 28, 2008, A121777) [nonpub. opn.].) Father failed to file a petition for extraordinary writ.

In its report prepared for the .26 hearing, the Department recommended that E.P. was likely to be adopted, that parental rights be terminated, and that a permanent plan of adoption be ordered.

At a contested .26 hearing on October 6, Father's counsel appeared, but he did not.<sup>5</sup> Father offered no evidence to contest the Department's recommendations.

Following the hearing, the juvenile court found that E.P. was likely to be adopted, ordered a permanent plan of adoption, and terminated the parental rights of both parents.

Both parents appealed. Mother filed a statement of no issues and we dismissed her appeal. Father filed a motion to recall the remittitur and reinstate the appeal in his failed appeal from the jurisdictional and dispositional findings and orders in A118791. We denied that motion on March 17, 2009.

## **II. DISCUSSION**

Father contends the juvenile court erred by terminating his parental rights without finding that he was an "unfit" parent, and that the court's finding of detriment at the jurisdictional/dispositional hearing is insufficient for a determination of "unfitness."

Father makes a false analytical distinction between a finding of unfitness and a finding of detriment. A dispositional finding of detriment, made by clear and convincing evidence, is the same thing as a finding of unfitness. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1210-1212 (*P.A.*)). "California's dependency scheme no longer uses the term 'parental unfitness,' but instead requires the juvenile court make a finding that awarding

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<sup>5</sup> The record suggests Father did not appear due to anxiety attacks.

custody of a dependent child to a parent would be detrimental to the child. [Citation.]” (*P.A.*, *supra*, at p. 1211.)

Thus, by arguing that the detriment finding is insufficient to support a finding of unfitness, Father is attempting to relitigate the validity of the detriment finding at the jurisdictional/dispositional hearing. Father, however, has waived the right to challenge findings made at this hearing by not perfecting an appeal from the jurisdictional and dispositional findings. He cannot challenge those findings on a subsequent appeal from an order terminating his parental rights.

Section 395 makes a dispositional order final and appealable. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150 (*Meranda P.*.) As such, “an unappealed disposition . . . order is final and binding and may not be attacked on an appeal from a later appealable order. [Citations.]” (*Meranda P.*, *supra*, at p. 1150.) This waiver rule is regarded as “sound.” (*Id.* at p. 1151.) As discussed at some length in *Meranda P.*, the waiver rule does not generally impede a parent’s due process rights because of the significant safeguards built into the dependency statutory scheme. (*Id.* at pp. 1154-1155.) The waiver rule also ensures reasonable expedition and finality of dependency proceedings, especially given the dependent child’s interest in securing a stable home free of circumstances causing parental abuse or neglect. (*Id.* at pp. 1151-1152, 1155-1156.) Finally, the waiver rule facilitates legislative intent: “authorizing parents to attack final appealable orders by means of an appeal from a subsequent appealable order would sabotage the apparent legislative intention to expedite dependency cases and subordinate, to the extent consistent with fundamental fairness, the parent’s right of appeal to the interests of the child and the state. [Citation.] The Legislature has made known its desire not to allow the child’s future to be held hostage to a postponed appeal.” (*Id.* at p. 1156, fn. omitted.)

Under the waiver rule, Father cannot now seek review of the detriment finding because he failed to prosecute an appeal from the dispositional findings and orders.

Father relies on *In re Gladys L.* (2006) 141 Cal.App.4th 845 (*Gladys L.*) and *In re G.S.R.* (2008) 159 Cal.App.4th 1202 (*G.S.R.*). Those cases are distinguishable. In each case, the reviewing court did not apply the waiver rule because the juvenile court did not make a detriment finding against the father, based on clear and convincing evidence, as required by due process before the termination of parental rights. (*Gladys L. supra*, at pp. 848-849; *G.S.R., supra*, at pp. 1205, 1210-1216.) In the present case the juvenile court made such a finding, and that detriment finding is supported by substantial evidence.

Father had the opportunity to appeal that finding and failed to do so. We also note that he failed to take a writ petition from the order setting a .26 hearing.

We thus conclude that Father has waived his right to seek appellate review of the detriment finding he attempts to challenge in the present appeal.

Although we do not reach the merits of Father's claims, we stress—as we have just noted—that the detriment finding is supported by substantial evidence. The juvenile court considered the details of Father's criminal history—including his admitted child sexual abuse involving two infants—and found, by clear and convincing evidence, that placing E.P. in Father's custody would be detrimental. Father was represented by counsel at the jurisdictional/dispositional hearing—and the juvenile court subsequently found that Father's counsel had rendered competent representation. The record amply supports the detriment finding, and the order terminating parental rights does not violate Father's right to due process.<sup>6</sup>

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<sup>6</sup> We also note that a separate petition against Father was not necessary to establish dependency jurisdiction. (*P.A., supra*, 155 Cal.App.4th at p. 1212.)

### **III. DISPOSITION**

The order terminating parental rights is affirmed.

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Marchiano, P.J.

We concur:

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Margulies, J.

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Graham, J.\*

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\* Retired judge of the Superior Court of Marin County assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.